Supreme Court, U.S.
FILED
FEB 8 - 2010
OFFICE OF THE CLERK

No. 09-647

IN THE

Supreme Court of the United States

ROBERT W. SHIMER,
VINCENT J. FIRTH,
EQUITY FINANCIAL GROUP, LLC
Petitioners,

COMMODITY FUTURES TRADING
COMMISSION
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Robert W. Shimer
Counsel of record
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645
Date: February 8, 2010

QUESTION PRESENTED

1. Whether the CFTC brief in opposition has provided the Court with a sufficient reason to not grant the petition.

TABLE OF CONTENTS

	Page
Petitioners' Reply to the "Statement" portion of the Respondent's opposition brief	2
Petitioners' Reply to the "Argument" portion of the Respondent's opposition brief	8
Conclusion	14
Supplementary Appendix	101a
Unedited Full Sentence of CFTC Cited Exerpt From 1995 Federal Register	102a
17 C.F.R. 4.13(a)(3)(ii)	103a

TABLE OF AUTHORITIES

Cases

CFTC v. R.J. Fitzgerald & Co., 310 F.3d 1321 (11th Cir. 2002) 10, 11

Lopez v. Dean Witter Reynolds, Inc., 805 F.2d 880 (9th Cir. 1986) 5-7, 13

Rosenthal & Co. v. CFTC, 802 F.2d 963 (7th Cir. 1986) 3, 4

Statutes

7 U.S.C. § 1 *et seq*..... 2
7 U.S.C. § 1a(5) 8, 9, 11, 13
Commodity Futures Trading Commission Act of 1974, Section 202 8
Commodity Futures Trading Commission Act of 1974, Section 205, section 4n 9

Regulations

Appendix A to 17 C.F.R. Part 4 12
17 C.F.R. § 4.10(d)(1) 10
17 C.F.R. § 4.13(a)(3)(ii) 12, 13

Miscellaneous

H.R. Rep. No. 975, 93d Cong., 2d Sess. 1974 . 10
60 Fed. Reg. 38146 at 38159 (1995) 12

IN THE

Supreme Court of the United States

No. 09-647

ROBERT W. SHIMER,
VINCENT J. FIRTH,
EQUITY FINANCIAL GROUP, LLC
Petitioners,

COMMODITY FUTURES TRADING COMMISSION
Respondent

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

The Commodity Futures Trading Commission ("CFTC") brief in opposition fails to squarely address and adequately respond to the many legitimate reasons previously offered by Petitioners for grant of the petition.

Petitioners' Reply to the "Statement" portion of the Respondent's opposition brief

1. The Respondent CFTC's basic difficulty in mounting a credible opposition to grant of the petition is located in the first paragraph of page 2 of its opposition brief. There Respondent describes the CFTC's admittedly "...broad regulatory power over the conduct of participants in commodity futures markets. See 7 U.S.C. 1 *et seq.*", and then immediately refers to those "markets" as places where "investors"

> "...*buy and sell futures* in either individual commodities or in what are known as "commodity pools." (Emphasis added).

Petitioner Robert W. Shimer ("Shimer") emphasized the critically important difference in meaning between "trading" and "investing" during oral argument:

> "The act of trading necessarily includes the concept of investing. But the concept of investing does not necessarily require the act of trading." [1]

Both the Respondent's opposition to the petition and the cited conflict that now exists between the circuits is born of the eagerness of the CFTC (and the willingness of the Third Circuit Panel) to ignore the critical and obvious difference between "investors" and "traders". An "investor" in

---

[1] See Third Circuit Panel oral argument transcript, page 4, lines 15-18

futures can certainly also be a "trader" in futures if that investor engages in the specific act of buying and selling. But an entity [such as Shasta Capital Associates, LLC ("Shasta")] is not a "trader" and is not engaged in "trading" if it is merely an investor in another entity that trades. An entity such as Equity that manages a non-trading entity such as Shasta is not, by any stretch of the imagination, involved in "trading".

2. On page 2 the CFTC cites to *Rosenthal & Co. v. CFTC*, 802 F.2d 963, 965 (7th Cir. 1986) for the otherwise truthful general statement that commodity pools are the "commodity-futures equivalent of a mutual fund...". The insufficiency of that generally truthful statement to resolve the threshold CEA related summary judgment issues presented in the petition was addressed in the petition.

In *Rosenthal & Co.* [a case cited in footnote 10 of the Third Circuit Panel Opinion (see Pet. App. 13a)] and now cited with equal enthusiasm by the Respondent on page 2 of its opposition brief the issue was whether the fraudulent behavior of Larry Pinckney as a registered "associated person" of the commodity broker firm Rosenthal & Co. ("Rosenthal") could be imputed to Rosenthal under provisions of the CEA. There was absolutely no doubt that the corporate entities managed by Larry Pinckney were operated as "commodity pools":

> "To trade commodity futures for the pools Pinckney had to use a commodities broker registered on the major commodity exchanges,

such as Rosenthal & Company..." *Rosenthal & Co.*, supra at 965.

Rosenthal & Co. exemplifies the inability of *any* of the cases cited by Respondent to refute the validity of Petitioners' CEA related "commodity pool/commodity pool operator" summary judgment argument. The cases cited by Respondent consistently *support* Petitioners' argument.

Both the Respondent and the Third Circuit Panel Opinion seem bound and determined to ignore an irrefutable reality: trading for and on behalf of the pool is always conducted by someone *in the name of the pool* from a trading account or trading accounts opened at a Futures Commission Merchant (FCM) such as Rosenthal. With all due respect, there is a certain "Alice in Wonderlandesque" quality to the way the inescapable "reality" of what commodity pools "do" has been so readily and consistently ignored throughout this litigation by both the district court and the appellate court at the urging of the CFTC.

3. Contrary to Respondent's contention in section 2, (second paragraph) page 3 of its opposition brief, Petitioners did *not* first properly move for summary judgment "...on the grounds (as relevant here) that Shasta was not a 'commodity pool operator' within the meaning of the Act." The first *pro se* motion for summary judgment of Petitioner Shimer (DDE No. 230) and the accompanying separate *pro se* motion for summary judgment of Petitioner Vincent J. Firth ("Firth") (DDE No. 231) both filed with the District Court on July 8, 2005

denied that Shasta was operated as a commodity pool by Petitioner Equity by reason of an essential material fact missing from the record (i.e. a trading account opened by anyone in the name of the alleged "pool" Shasta).

In that same paragraph on page 3 of the opposition brief the Respondent also mischaracterizes the holding of the district court. The district court never held that

> "it was immaterial whether Shasta traded futures directly or whether it traded indirectly through a larger fund such as Tech Traders. See *id* at 40a-41a."

One will search in vain for any reference whatsoever to the non-existent and fictional concept of "indirect trading" as a basis for the district court's willingness to twice deny Petitioner Shimer and Firth's separate *pro se* motions for summary judgment. The district court denied the summary judgment motions of Petitioners Shimer and Firth because it pretended to apply the four tests of *Lopez* while virtually ignoring the actual clear and unequivocal language of that Ninth Circuit decision.

4. In the last paragraph on page 4 Respondent reflects the appellate court's mischaracterization of Petitioners' *Lopez* argument. Petitioners never argued that Lopez "...imposed a direct trading requirement, and that the court of appeals in this case should follow that precedent." Petitioners' *Lopez* based argument is not addressed merely to test #4 as a "stand alone argument" though the lack of a

specific "trading account" in the name of the alleged pool Shasta made clear the missing "essential material fact". Test #4 is a logical and necessary extension of the very specific and clear language contained in the previous three tests.

On the next page Respondent also points out correctly that *Lopez* "...did not address whether a commodity pool operator must itself execute commodity futures transactions." The presently cited conflict in the circuits is not extinguished by the Respondent's ability to recognize and recite the obvious. The *Lopez* Court never addressed the specific summary judgment issue raised by the Petitioners' appeal because the Dean Witter "account" described and discussed in Lopez *was clearly a commodity futures trading FCM account.* The *Lopez* court affirmed the district court's grant of summary judgment for Dean Witter because (despite the fact that commodity futures trading was being conducted from that particular FCM "account") the third "test" for determining whether a "commodity pool" existed under any particular set of facts (i.e. pro rata distribution of profits or losses) was not met.

Lopez very clearly and obviously stands for the proposition that if *even one* of the four enumerated tests are not met, a "commodity pool" does not exist. The Respondent's argument in defense of the Third Circuit Court's willingness to pretend that all four specific *Lopez* tests really need not be applied to the entity Shasta depends on Respondent's fervent hope that this Court will ignore the following very obvious conclusions that clearly flow from the very precise and specific language contained in all four

"commodity pool" *Lopez* tests derived from prior federal case law:

1) All four tests must be met for a "commodity pool" to exist; and,
2) The language of all four tests when read together, require that the "account" (whose purpose is clearly described by the language of *Lopez* test #1), is an account from which "transactions" (which are in the nature of commodity futures contracts) are "executed" for and on behalf *of that same account (*see *Lopez* test *#2)*; and,
3) The required pro rata distribution of profits or losses to "pool" participants occurs from "the commodity futures trading" (test #3); and,
4) The transactions (referenced in test #2) from the "account" described in test #1 are traded by a commodity pool operator *in the name of the pool* as opposed to being traded in the name of an individual investor. (See *Lopez* test #4).
5) All four tests enumerated by the Ninth Circuit Court clearly refer to the exact same "account" being analyzed to determine if "commodity pool" activity is present with respect to that "account".
6) No "account" ever existed for the entity Shasta that comes *even close* to satisfying the clear language of the four *Lopez* tests.

The *Lopez* court had no reason to focus on and specifically consider the applicability of the "in the name of the pool" requirement of test #4 to the Dean

Witter CGAP account because the presence of that particular test was obviously not in dispute. That fact does not extinguish or remove the cited four-fold conflict that now exists between the Ninth and Third Circuits.

Petitioners' Reply to the "Argument" portion of the Respondent's opposition brief.

1. The Respondent's first contention on page 5 of the "argument" section of its brief that the Third Circuit Panel's decision "does not conflict with...another court of appeals" has been adequately addressed in the *Lopez* discussion provided just above as well in Parts I A, B, C & D of the writ petition. That this Court has not yet had occasion to address and answer the specific "commodity pool/commodity pool operator" issues raised by this appeal is not a sufficient reason to deny the petition.

2. The Respondent refers on page 5 of its opposition brief to the "drafting history" of 7 U.S.C. § 1a(5) in support of its contention that the court of appeals was correct in its "interpretation" of the statute. But no such "drafting history" of that statute is ever provided. At the top of page 6 of the opposition brief Respondent also argues that the language of the statute "...does not specify who must do the trading." That argument is a bit disingenuous in light of 1) the extensively referenced CPO trading related regulations of the Respondent CFTC cited in the writ petition (which, in effect, collectively represent a highly relevant regulatory "interpretation" of the statute) (See Pet. App. 64a-81a); and 2) the legislative history of Section 202 of

the 1974 Act that amended the CEA to include the statutory definition of CPO now basically found at 7 U.S.C. § 1a(5) and the legislative history of Section 205 of that same Act. (Pet. App. 86a-93a)

Noticeable by its absence is any attempt by Respondent to discredit or refute Petitioner Shimer's discussion of the comments with respect to Section 205, section 4n of that same Act that accompanied Senate Report No. 93-1131 pertaining generally to registration with the newly created CFTC of Commodity Trading Advisors ("CTAs") and CPOs. (See specifically Pet. App. 90a-93a). It is clear from the cited legislative history of the 1974 Act that amended the CEA and created the CFTC that Congress had a clear and obvious expectation that CPOs would ordinarily be intimately and directly engaged in the actual trading of commodity futures contracts. And, contrary to the preferred "interpretation" of both the CFTC and the Third Circuit Panel, that clear expectation on the part of Congress is reflected in the specific language of 7 U.S. C. § 1a(5).

3. The Respondent argues on page 6 that the "statutory scheme" of the CEA would be "frustrated" if the clear meaning of the statutory language is applied because "unsuspecting traders" would not be protected "from deceptive practices". But this argument brings us, once again, full circle to the inexplicable willingness of the Third Circuit Panel to follow the lead of the Respondent and continuously confuse and blur the clear difference between "traders" and those who are "investors" that do not trade.

The Respondent cites on that same page 6 of its opposition brief to the justifiable concern expressed in H.R. Rep. No 975, 93d Cong., 2d Session, 64 (1974) for protecting "prospective pool participants" from "deceptive practices". The Respondent's difficulty is that the entity Shasta is not a "pool" under the clear four part test enunciated by *Lopez* nor is it a "pool" under the now narrowed regulatory definition of "pool" found at 17 C.F.R. § 4.10(d)(1) that previously, according to the CFTC's own admission, defined a "pool" as "any investment trust, syndicate or similar form of enterprise that *trades* commodity interests". (See writ petition, p. 24).

The Third Circuit Panel Opinion and the Respondent seem perfectly content to ignore the fact that the statement provided by Dr. Clayton Yeutter, Assistant Secretary of Agriculture found at H.R. Rep. No. 93-975, at 79 (1974) specifically expresses a concern that "...unsophisticated *traders* have lost substantial amounts of money through commodity advisors and commodity pool operators..." and further stated that the referenced bill would "...eliminate certain undesirable practices which have enticed unsuspecting *traders* into the markets...". (Emphasis added) (See Panel Opinion at Pet. App. 17a-18a). Where is the legal basis for suddenly extending that justifiable concern about protecting commodity futures traders to entities and members of entities that *are not* "traders"?

In further support of its argument that the "intent" of the CEA would be somehow undermined if the petition is granted and the Third Circuit's

questionable interpretation of 7 U.S.C. § 1a(5) is not adopted, Respondent cites on page 6 of its opposition brief to *CFTC v. R.J. Fitzgerald & Co.*, 310 F.3d 1321, 1329 (11th Cir. 2002). R.J. Fitzgerald & Co. ("RJFCO") was a registered introducing broker with the CFTC alleged by the CFTC to have engaged in fraudulent solicitation practices (a cable network commercial and a promotional seminar) to induce individual investors to actually open commodity futures trading accounts at RFJCO. The named RFJCO defendants were alleged, among other things, to have *operated an introducing brokerage firm* to cheat and deceive clients. They also *traded* client accounts excessively in order to generate commissions without regard to customer interests!

General statements made by the Eleventh Circuit Court in that particular case about the "remedial nature" of the CEA and the clear ability of the CEA to reach the behavior of individuals and entities engaged in defrauding investors (solicited to open commodity futures trading accounts and who, in response to those solicitations, actually opened commodity trading accounts and engaged in the trading of commodity futures contracts) offer absolutely no support whatsoever for the Respondent's attempt to defeat the petition and to defend the Third Circuit Court's highly questionable interpretation of the "for the purpose of trading" language of 7 U.S.C. § 1a(5).

4. In further support of the Third Circuit's questionable interpretation of 7 U.S.C. § 1a(5) and in support of a denial of the petition Respondent contends that it "...has consistently interpreted the

term 'commodity pool operator' to include pools that indirectly trade futures by investing in other commodity pools." As pointed out in the writ petition, the CFTC has absolutely no authority whatsoever to broaden or extend the definition of CPO to include entities not presently included within the statutory definition provided by Congress. The CFTC is certainly free to request a revision of the existing statutory definition if it truly feels that to be necessary.

On pages 6 and 7 the CFTC offers the Court what appears to be a carefully edited part of one sentence otherwise buried in forty-five pages of extensive final rule making discussion found in the 1995 Federal Register (60 Fed. Reg. 38146 at 38159) that actually refers to the possible distribution of pool assets to "multiple CTAs" as well as multiple "investee pools". Even if all of a pool's assets are allocated, for example, *to multiple CTAs*, all trading is still being conducted for that pool by each CTA from pool trading accounts opened *in the name of the pool* at a FCM. The author of this Federal Register submission never addresses the "pool" issue raised by the total lack of trading by the entity Shasta. The full *unedited* Federal Register sentence cited by respondent is provided for the convenience of the Court as Petitioners' Supplemental Appendix page 102a following this reply brief.

5. On page 7 of its opposition brief the Respondent also references Appendix A to 17 C.F.R. Part 4 as an apparent reason to support the Third Circuit interpretation of 7 U.S.C. § 1a(5) and deny the petition. The introductory text to Appendix A to

Part 4 "Fund of Funds" refers to the guidance that particular Appendix provides for application of the trading limits of Rule 4.13(a)(3)(ii) to CPOs that operate "fund of funds". That Rule's purpose is not to aid in determining if an entity qualifies as a "pool" but to merely determine if a CPO can forego registration with the CFTC if its pool meets certain predefined regulatory limits on the amount of market risk exposure of the pool's portfolio. Rule 4.13(a)(3)(ii) specifically refers to "commodity interest positions" of the pool which, of course, do not exist without a trading account at a FCM opened in the name of the pool. Relevant portions of Rule 4.13(a)(3)(ii) are provided for the convenience of the Court as Petitioners' Supplemental Appendix beginning at page 103a following this reply brief.

6. Respondent's arguments with respect to *Lopez* found on pages 7, 8 and 9 of the opposition brief have been sufficiently addressed previously in this reply brief. The Respondent does not adequately address the serious specific conflicts described in the petition that now exist between the Ninth Circuit and the Third Circuit Court. Respondent's opposition brief also fails to provide a reasonable answer as to why unnecessary confusion was not created by the Third Circuit Court's unwillingness to recognize and acknowledge the clear distinction between those who "invest" and those who "trade" for the purpose of determining what entities are required to register with the CFTC as CPOs.

Conclusion

The petition should be granted to definitively address the significant legal issues first stated therein and to resolve the unnecessary conflict in the circuits created by the Third Circuit Court's untenable interpretation of 7 U.S.C. § 1a(5).

Respectfully submitted,

Robert W. Shimer
414 Allendale Way
Camp Hill, PA 17011
(717) 506-0645

February 8, 2010